VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

MOTHER DOE
and
FATHER DOE

vs. Chancery No. __________

Anthony Conyers, Jr., in his official capacity as
Commissioner of Virginia Department of Social Services
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and

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and

Governor Mark R. Warner, in his official capacity
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IN RE: INFANT DOE

BILL OF COMPLAINT

Comes now, MOTHER DOE and FATHER DOE,[1] by counsel, and for their bill of complaint states as follows:

1. INFANT DOE is a juvenile residing in Chesterfield County with his natural parents MOTHER DOE and FATHER DOE and family.

2. MOTHER DOE and FATHER DOE are caring and concerned parents with college educations. They are mentally, physically and morally fit and are capable of making rational decisions regarding the care of their children. They are respected members of the community.

3. **Anthony Conyers, Jr.** is the Commissioner of the Virginia Department of Social Service.

4. **Sarah C. Snead,** is the Director of the Chesterfield Department of Social Services, in the Commonwealth of Virginia.

5. **Governor Mark R. Warner** is the chief executive of the Commonwealth of Virginia responsible for law enforcement in Virginia.

Background

6. MOTHER DOE observed and became concerned about INFANT DOE s general condition and appearance for a four year old child, which included but was not limited to pallor (pale appearance), general fatigue, complaints of leg pain and diminished athletic abilities. As a result.

7. On January 25, 2004, MOTHER DOE, a registered nurse, and FATHER DOE took their

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[1]The names of the plaintiff and the infant are pseudonyms as the litigants and more particularly the infant who is the subject of this suit are entitled to proceed anonymously from the public under the factors set forth in § 8.01-15.1.

child to a primary care facility and requested various specific labs including a hemoglobin and hematocit, which returned with significant abnormalities.

8. The following day, MOTHER DOE and FATHER DOE took INFANT DOE to a pediatric emergency room for a more thorough examination and evaluation requesting attention to INFANT DOE s labs, where he was diagnosed with mononucleosis. However, while at the hospital that day, he developed a fever and INFANT DOE was transferred to the Medical College of Virginia hospital (MCV).

9. Following a bone marrow aspiration and lumbar puncture, INFANT DOE was diagnosed with Acute Lymphoblastic Leukemia (Leukemia) on January 27, 2004.

10. MOTHER DOE and FATHER DOE requested and received aggressive treatment for the sepsis (blood infection causing the fever). Following a dispute among the treating physicians regarding the timing of surgery for portacath (an I.V. access for chemotherapy administration) due to the risk of infection and complications while the sepsis continued, the portacath was placed by surgery only after the blood cultures were negative for bacterial growth. With consent of MOTHER DOE and FATHER DOE, chemotherapy was initiated for treatment of the Leukemia. INFANT DOE was discharged on February 2, 2004 and taken home by the DOEs.

11. Thereafter, INFANT DOE continued to receive periodic chemotherapy treatments, including intrathecal (injection into the cerebro spinal fluid via the spine by a lumbar puncture) Methotrexate and IV Vincristine and Dexamethasone. On or about February 27, 2004 the lumbar puncture and bone marrow aspiration, performed on that day, was negative for visible Leukemia cells and it was determined that the Leukemia was in

remission.

12. Thereafter, every three (3) weeks, INFANT DOE received a 24 hour administered high dose I.V. Methotrexate together with intrathecal Methotrexate injections for a total of five (5) admission and treatments.

13. The next phase of his treatment involved orally administered Methotrexate every two weeks and intrathecal Methotrexate, IV Vincristine and oral Dexamethasone every 12 weeks.

14. INFANT DOE has completed three (3) of the 12 week cycle treatments and is approaching the date of the next scheduled treatment of the intrathecal Methotrexate and accompanying drugs.

15. The treatment course for INFANT DOE, being administered by MCV Hospital, referred to as **Protocol #9905** and is modeled after Protocol # 9905, a clinical trial conducted by the Children s Oncology Group,[2] of which MCV Hospital is a member. The Protocol #9905 consists of 130 weeks of treatment of which INFANT DOE has completed 71 weeks.

16. INFANT DOE s next scheduled treatment was delayed without explanation by the MCV Hospital, but is imminent.

17. **In the interim, MOTHER DOE and FATHER DOE have become**

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[2]The Children's Oncology Group (COG) is a National Cancer Institute-supported clinical trials cooperative group devoted exclusively to childhood and adolescent cancer research. COG develops and coordinates cancer clinical trials conducted at the 238 member institutions, which include cancer centers of all major universities and teaching hospitals throughout the U.S. and Canada, as well as sites in Europe and Australia. C.O.G. members include over 5000 cancer researchers dedicated to saving the lives of children with cancer.

increasingly concerned about the efficacy of the continued treatment plan when balanced against the serious short term, long term and late term (those manifested later) effects coupled with the absence of any scientific evidence of any continued Leukemia.

Side Effects Harmful to INANT DOE

18. **Methotrexate**[3] is an anti-neoplastic, an anti-rheumatic, a nucleic acid anti-metabolite and a "folic acid antagonist".

19. Methotrexate has a general toxicity because it affects all rapidly dividing cells, such as those in the intestinal mucosa and prevents the production of tetrahydrofolate from folic acid in all tissues. Tetrahydrofolate is a necessary compound in many biosynthetic pathways, not just the synthesis of DNA. One of these is the synthesis of L-glutamate.

20. In general terms Methotrexate prevents cell growth and division by replacing folic acid needed for that growth and cell division because its structure is very similar to folic acid.

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[3] The CA name for methotrexate is: N[4-[[(2,4-diamino-6-pteridinyl)methyl]methylamino]benzoyl]-L-glutamic acid. The CA registry number is 59-05-2. Common synonyms: Mexate, Methylaminopterin, Emtexate, Metatrexan, Methopterin, MTX dihydrate, Folex, Folex PFS, Amethopetrin. At two stages in the biosynthesis of purines (adenine and guanine) and at one stage in the synthesis of pyrimidines (thymine, cytosine, and uracil), one-carbon transfer reactions occur which require specific coenzymes. These coenzymes are synthesized in the cell from tetrahydrofolic acid. Tetrahydrofolic acid itself is synthesized in the cell from folic acid with the help of an enzyme, folic acid reductase. Methotrexate looks a lot like folic acid to the enzyme, so it binds to it thinking that it is folic acid. In fact, methotrexate looks so good to the enzyme that it binds to it quite strongly. All the folic acid reductase enzymes in the cell bind merrily to the methotrexate and ignore any folic acid they might see. Thus, DNA synthesis cannot proceed because the coenzymes needed for one-carbon transfer reactions are not produced from tetrahydrofolic acid because there is no tetrahydrofolic acid. Again, without DNA, no cell division

(See Attachment A).

21. **Vincristine** is a cancer (antineoplastic) medication. Vincristine interferes with the growth of cancer cells and slows their growth and spread in the body.

22. **Dexamethasone** is a steroid used in the treatment protocol, with common serious side effects, including but not limited to fluid retention and weight gain, increased blood sugar, depression, hypertension, nausea, acne, bone pain, muscle wasting, anorexia. The side effects of dexamethasone also include risks of developing infection since dexamethasone suppresses the inflammatory response and make it more difficult for a patient s body to fight off any infection. Additionally, the late effects include but are not limited to Osteopenia and Osteoporosis (decreased bone mineral density, Avascular necrosis (a loss of blood vessels to the bone), Cataracts of the eyes.

23. Methotrexate has serious potential side effects, including but not limited to

    a. Neurocognitive deficits: Diminished IQ (with high dose and/or intrathecal methotrexate and/or cranial radiation);

    b. Functional deficits in: Processing speed Memory (particularly visual, sequencing, temporal memory) Sustained attention Visual-motor integration Math Reading (particularly reading comprehension) Planning and organization;.

    c. Clinical leukoencephalopathy (spasticity, ataxia, dysarthria, dysphagia, hemiparesis, seizures) with or without imaging abnormalities: - leukoencephalopathy - cerebral lacunes - cerebral atrophy - dystrophic calcifications - mineralizing microangiopathy

24. **Vincristine** has similar serious short-term and late developing side effects.

25. According to the Children s Oncology Group of which MCV Hospital is a member, prospective studies are needed to define the dose/effect relationship of neurotoxic agents [like Methotrexate and Vincristine,]. The Children s Oncology Group has further warned that new deficits may emerge over time.

Fit Parents

26. **MOTHER DOE and FATHER DOE are concerned by statements made to them by the treating physicians and hospital staff (the hospital) and recent news reports, that should MOTHER DOE and FATHER DOE exercise their judgment as parents that the serious risk of injury to INFANT DOE exceeds the benefit of ongoing treatment where there is no evidence of continued Leukemia, based upon the limited information provided to them by the hospital and other and further information gathered by the parents, that the hospital, law enforcement officials or the Department of Social Services would seek to remove INFANT DOE, and even their other child from their custody, care and control and subject INFANT DOE to continued treatment over their objection, should they determine that in the best interest of their child, the treatment should be discontinued.**

27. MOTHER DOE and FATHER DOE are concerned that § 63.2-1517[4] of the Code of Virginia, does not provide adequate protection against what could be highly disruptive and harmful to their family unit and to the health, safety and welfare of INFANT DOE and infringes upon their fundamental liberty interest guaranteed by the United States Constitution. § 63.2-1517 provides in pertinent part as follows: A physician or child-protective services worker of a local department or law-enforcement official investigating a report or complaint of abuse and neglect may take a child into custody for up to 72 hours without prior approval of parents or guardians provided.... :

28. MOTHER DOE and FATHER DOE are both fit parents and have the longest relationship with INFANT DOE, and have been the primary care givers and providers of INFANT

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[4] 63.2-1517. Authority to take child into custody
A. A physician or child-protective services worker of a local department or law-enforcement official investigating a report or complaint of abuse and neglect may take a child into custody for up to 72 hours without prior approval of parents or guardians provided:
1. The circumstances of the child are such that continuing in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the child's care, presents an imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result or if evidence of abuse is perishable or subject to deterioration before a hearing can be held;
2. A court order is not immediately obtainable;
3. The court has set up procedures for placing such children;
4. Following taking the child into custody, the parents or guardians are notified as soon as practicable. Every effort shall be made to provide such notice in person;
5. A report is made to the local department; and
6. The court is notified and the person or agency taking custody of such child obtains, as soon as possible, but in no event later than 72 hours, an emergency removal order pursuant to §§ 16.1-251; however, if a preliminary removal order is issued after a hearing held in accordance with §§ 16.1-252 within 72 hours of the removal of the child, an emergency removal order shall not be necessary. Any person or agency petitioning for an emergency removal order after four hours have elapsed following taking custody of the child shall state the reasons therefor pursuant to §§ 16.1-251.
B. If the 72-hour period for holding a child in custody and for obtaining a preliminary or emergency removal order expires on a Saturday, Sunday, or legal holiday or day on which the court is lawfully closed, the 72 hours shall be extended to the next day that is not a Saturday, Sunday, or legal holiday or day on which the court is lawfully closed.

DOE. As a result of the natural bonds of affection, MOTHER DOE and FATHER DOE are lead to act in the best interests of their child INFANT DOE.

29. MOTHER DOE and FATHER DOE have and continue to adequately care for INFANT DOE and their other child.

30. MOTHER DOE and FATHER DOE are best able to act in the best interests of their child INFANT DOE and to make decisions consistent with the best interests of their children.[5]

Liberty Interest

31. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The U.S. Supreme Court has long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process."[6] The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."[7]

32. The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court and Virginia Courts.[8] In light of this

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[5]More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (U.S., 2000) Parham v. J.R., 442 U.S. 584 (1979)

[6]*Washington v. Glucksberg*, 521 U.S. 702, 719, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)

[7]521 U.S. at 720; *see also Reno v. Flores*, 507 U.S. 292, 301-302, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993); *Troxel v. Granville*, 530 U.S. 57, 65 (U.S., 2000)

[8]More than 75 years ago, the Court in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), held that the "liberty" protected by the Due Process Clause

extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children,[9] including medical treatment decisions.

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includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, the Court in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." The Court explained in *Pierce* that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535. The Court returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children, stating "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166. In subsequent cases also, the Court has recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *See, e.g., Stanley v. Illinois,* 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.*, 442 U.S. 584, 602, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra*, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children" (*citing Meyer and Pierce*)).

[9]*Troxel v. Granville*, 530 U.S. 57, 65-67 (U.S., 2000)

33. **So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children**.[10]

34. Any infringement of the fundamental right of parents to make difficult decisions concerning the care, custody, and control of their children is to be subjected to **strict scrutiny.**[11]

35. **The defendants and the Commonwealth of Virginia lack a legitimate governmental interest, to say nothing of a compelling one, in second-guessing fit parents difficult decisions regarding the balancing of serious health risks and the efficacy of a trial treatment protocol and particularly where there is no evidence that a child currently has Leukemia**.[12]

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[10] *Troxel v. Granville,* 530 U.S. 57, 68-69 (U.S., 2000) *citing Flores,* 507 U.S. at 304.

[11] *Williams v. Williams*, 256 Va. 19, 21, 501 S.E.2d 417, 418 (1998)(compelling state interest required before authorizing state interference with a parent s right to make decisions regarding the child) *Troxel v. Granville*, 530 U.S. 57, 80 (U.S., 2000)(Thomas, J. concurring)

[12] Justice Thomas, concurrence: I would apply strict scrutiny to infringements of fundamental rights. Here, the State ... lacks even a legitimate governmental interest -- to say nothing of a compelling one -- in second-guessing a fit parent's decision.... . *Troxel v. Granville*, 530 U.S. 57, 80 (U.S., 2000)(case involving visitation to grandparent over natural parent objection)

36. While the fundamental liberty interest of a parent to provide care, custody and control of their children is not without limits, fit parents and not the state are best able to make difficult decisions concerning the best interests of the child.

37. Simply because the decision involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.[13]

38. A finding of **actual harm** to the child s health and welfare rather than **potential harm** to the child s health or welfare is required before a court can justify interfering,[14] which does not exist in the present case where the side effects are actual and any harm from ending the trial protocol treatment is speculative at best where there is no evidence of present Leukemia.

Count 1
COMMON LAW PRELIMINARY AND PERMANENT INJUNCTION

39. The foregoing paragraphs are incorporated herein.

40. Plaintiffs pray for a preliminary and permanent injunction against defendants prohibiting them from taking temporary protective custody of INFANT DOE or their other child or from seeking an order requiring continuation of treatment under the trial protocol # 9905 or any other course of treatment over the objection of the plaintiffs, and for such further and other relief as may be appropriate.[15]

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[13] *Parham v. J.R.*, 442 U.S. 584, 603 (1979)

[14] *See Williams v. Williams*, 256 Va. 19, 22, 501 S.E.2d 417, 419 (1998)

[15] This is not a case of parents objecting to medical treatment for their child on the basis of a religious belief and therefore the numerous cases ordering treatment over parental religious objections are inapposite.

Count 2
FEDERAL CONSTITUTIONAL INJUNCTION
42 U.S.C. § 1983

41. The foregoing paragraphs are incorporated herein.

42. The plaintiffs assert that the United States Constitution protects INFANT DOE and MOTHER DOE and FATHER DOE by providing that otherwise fit parents of a child hold the right and responsibility to make decisions regarding the health, care and welfare of a child, including but not limited to difficult decisions balancing serious health risks and the efficacy of a trial treatment protocol where there is no evidence that a child currently has Leukemia, and that the state should not substitute its judgment for that of the parents.

43. Plaintiffs pray that the court would declare their right and responsibility as stated in the foregoing paragraph.

44. Plaintiffs pray that the court would declare § 63.2-1517 of the Code of Virginia, unconstitutional as applied to otherwise fit parents who make difficult medical decisions which weigh the risks of treatment against the benefits of treatment.

45. Plaintiffs pray for a preliminary and permanent injunction against defendants prohibiting them from taking temporary protective custody of INFANT DOE or their other child or from seeking an order requiring continuation of treatment under the trial protocol # 9905 or any other course of treatment over the objection of the plaintiffs, and for such further and other relief as may be appropriate.

Count 3
DECLARATORY JUDGMENT

46. The foregoing paragraphs are incorporated herein.

47. Plaintiffs pray that the Court declare the child INFANT DOE is not neglected under Va. Code § 63.2-1517, as a result of otherwise fit parents making difficult medical decisions regarding the care and treatment of their child after taking into account the risks and benefits of any proposed treatment.

48. Plaintiffs pray that the Court declare that MOTHER DOE and FATHER DOE are fit parents, and to further declare the rights of the fit parents to make difficult decision regarding the balancing of serious health risks and the efficacy of a trial treatment protocol where there is no evidence that a child currently has Leukemia, and for such further and other relief as may be appropriate.

MOTHER DOE
FATHER DOE

By:___________________________________
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Certificate of Service

I certify that on this 17th day of June, 2005, I caused a copy of the foregoing to be faxed

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